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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

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**No. 898**

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KOHLER CO.,

*Petitioner,*

*v.*

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

AND

NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

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## BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

On August 26, 1960, following six years of proceedings before the National Labor Relations Board involving more than twenty thousand pages of testimony and one thousand exhibits, the Board unanimously found the Kohler Company guilty of repeated violations of its obligations under the federal labor law. The court below affirmed the Board findings that the Company engaged in a variety of violations of its obligations under the law, including refusal to bargain on and after June 1, 1954, unlawful unilateral wage increases, illegal inducement of workers to abandon the strike, prohibited surveillance of protected activities, arbi-

trary refusal to furnish data necessary for bargaining, discriminatory denial of housing to striking workers and discriminatory discharge of strikers. The Court, however, went farther than simply affirming the Board's findings against the Company; it remanded to the Board for further findings and disposition on the question whether the Company was refusing to bargain in good faith even prior to commencement of the strike on April 5, 1954, and the question whether 77 discharged strikers should be reinstated pursuant to the discretionary authority of the Board under Section 10(c) of the Act.

The Company seeks review in this Court both of those parts of the decision below affirming the Board's findings against the Company (Pet. Pts. I & II) and of the two parts of the decision below remanding the case to the Board for its further consideration (Pet. Pts. III & IV). Although the Company is thus seeking review of essentially factual matters, its Petition for Certiorari neglects to set forth the facts which prompted the rulings below. Because the Board's Opposition will doubtless set forth the facts supporting the Court of Appeals' affirmance of the Board in its finding of numerous Company violations on and after June 1, 1954, we refrain from burdening the Court with an additional presentation of those events. However, we deem it necessary to review the compelling factual history which demonstrates that the Company failed to bargain in good faith during the *pre-strike* negotiations. This history attests the eminent correctness of the Court of Appeals' remand to the Board for further consideration of the Company's pre-strike bargaining posture. And the appropriateness of the remand on this threshold issue renders premature the grounds upon which this Court is urged by the Company to review essentially factual questions.

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**The Facts Underlying the Court of Appeals' Remand to the Board on the Company's Pre-Strike Failure to Bargain.**

1. In 1933, faced with the threat of organization by the American Federation of Labor, Kohler built its own "union"—the Kohler Workers' Association. Lyman Conger, who for many years has been Kohler's principal spokesman in labor relations matters, participated in launching KWA (J.A. 3468-3470, 3874-3876). The circumstances of the founding of KWA were carefully sifted by the pre-Wagner Act Labor Board in 1934, with a view to determining Kohler's compliance with the guarantees of uncoerced organization and bargaining embodied in the National Industrial Recovery Act:

> "Thus it is clear that the company participated in forming and engaged actively in promoting the new organization, that the workers had no opportunity of expressing an unfettered choice as to whether or not they wished to belong to it, and that the company not only indicated its favorable attitude toward the organization but stood ready to finance its existence. Under such circumstances, the organization could not have that independence which is essential to a true collective bargaining agency, and the sudden and extensive promotion of the plan at a time when an outside union was just being formed can only be considered as a deliberate design to influence the allegiance of the employees and to interfere with their free and unhampered self-organization which Section 7(a) guarantees." *The Kohler Company,* 1 Decisions of the National Labor Relations Board, 72, 75 (1934).

2. The following year, 1934, the AFL went on strike at Kohler. The Company repulsed the AFL's efforts with a bloody ferocity which stamped Kohler's attitude toward labor relations as unique even in that era. See Walter H. Uphoff, *The Kohler Strike* (1935), *passim; Hearings before the Select Committee on Improper Activities in the Labor or Management Field,* 85 Cong., 2d Sess., Part 24, pp. 9607 *et seq.*, pp. 9871 *et seq.* Thus was ushered in the era of company-dominated "labor peace," the perpetuation of which has remained Mr. Conger's guiding philosophic star in the conduct of Kohler's labor relations ever since 1934. In September of 1954 Conger recalled those events to Judge Arold Murphy, as he rebuffed the Judge's attempts at conciliation: "He [Conger] said that there had been a bitter strike in 1934; that it resulted in twenty years of labor peace, and that he was going to insist that this strike bring to the Company twenty years of labor peace, and that at some place along the line, he said, 'we are going to teach the union a lesson' " (J.A. 193).

3. The Company's union, KWA, proceeded smoothly upon its unarduous duties until the mid-1940s, when the first signs of opposition to the company union appeared. But it was not until 1951 and 1952, when the UAW first attempted to organize Kohler, that it became necessary for Kohler to resume its coercive anti-unionism. The pattern of Kohler's anti-UAW attitudes and illegal activities during this period is detailed in *Kohler Co.,* 108 NLRB 207 (1954), and *N.L.R.B.* v. *Kohler Co.,* 220 F. 2d 3 (C.A. 7, 1955). As the Court of Appeals for the Seventh Circuit observed in its enforcement opinion: "The Company argues that there was no proper evidence showing a background of hostility toward the UAW. But throughout the contest between the KWA and the UAW the officers of the Company certainly made no attempt to conceal the

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fact that they did not want the UAW in the plant, and after the first election, which was won by the KWA, Conger, the Chairman of the Company's Management Committee, boasted: 'We are the ones that won that election for you. We got on the air and put ads in the papers and we are certain that is what changed the picture, otherwise we might be meeting with somebody else right now.' " *Id.* at 9.

4. In 1953, following the selection of an independent union of Kohler workers by the UAW's victory in the election of a bargaining representative, Kohler grudgingly concluded a minimal one-year contract with the UAW. But no sooner was the agreement concluded than the Company made even its modest concessions illusory by various types of dilatory conduct. As Member Jenkins noted in his dissent in the present Board proceedings (J.A. 84-85):[1]

> "The Respondent entered into its one and only contract with the Union after 15 months of negotiations, and then only after the General Counsel had issued a complaint alleging violations of the Act. *Further, this contract was so phrased that its effective administration was dependent on information only Respondent could supply.* After entering into this contract the Respondent sought to undermine the status and influence of the Union as collective bargaining representative by (a) failing to supply information necessary to the effective administration of the contract; (b) taking coercive action toward union stewards;

[1] While the Board was unanimous in its findings of numerous violations of the Act by the Company on and after June 1, 1954, it was divided on the question whether the Company had refused to bargain in good faith prior to the strike. Member Jenkins in his dissent on this score sets forth the considerations which induced him to find that the Company's pre-strike negotiations with the Union were merely a pretext at bargaining rather than a good faith effort to reach agreement. See J.A. 83-118.

(c) and otherwise making processing of grievances difficult. For example, information vital to the contractual commitments of 1953 concerning the so-called wage-incentive system was withheld from the Union. Many employees complained that they were receiving less take-home pay by virtue of production standards manipulation, but the Union could never determine the truth or falsity of this claim because Respondent refused to supply it with needed information."[2]

5. Before and after 1953 President Herbert V. Kohler articulated his animosity toward the UAW. Said Mr. Kohler in 1952: ". . . Kohler Company, as a Company, is opposed to the UAW-CIO" (Un. Ex. 21, J.A. 2287)—and he added, significantly, "We have had 17 years of industrial peace at Kohler without the CIO . . ." (J.A. 2289). From the witness stand in this proceeding before the Trial Examiner, Mr. Kohler made plain the implacable attitude with which he entered into the 1953 contract: "I had an idea from the day we signed the first contract that they were going to pull a strike as soon as they could, as soon as they could drench the minds of these people" (J.A. 260). "They are a very militant union, and they have threatened us over the years, and they have gone on strike, and we are trying to protect our lives. . . . The life of the Company, that is"

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[2] Member Jenkins noted further: "I have difficulty, at the outset, in seeing how the Respondent's consummation of the 1953 contract 'amply refutes' (as the majority finds) the inferences fairly to be drawn from all of the Respondent's prior conduct. This might be so had the Respondent administered this contract *and* its statutory obligations 'in good faith' during its life. But, as the majority admits (and we *all* find), Respondent violated both its contractual and its statutory obligation to its employees *during that contract term*. I must specifically dissent, therefore, from their view that the Respondent's consummation of the 1953 contract evidenced the Respondent's substantial deviation from the regrettable attitude towards its statutory obligations that it had entertained (and implemented) for the past 20 years" (J.A. 96-97).

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(J.A. II, 287). And by November of 1955 Mr. Kohler had generalized the problem: "Who runs this country? . . . That is the issue at Kohler. It is the potential question for all industry. We must meet this issue fighting" (G.C. Ex. 326).

6. Negotiations between the Union and the Company for a new contract commenced in early 1954. It has ever since been the contention of the Union that Kohler's conduct with respect to the principal issues between the parties regarding a new contract manifested its desire not to reach but to avoid an agreement with the Union. It has been the Union's view that the Company was "obligated to make some reasonable effort in some direction to compose differences with the Union." See *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (C.A. 1, 1953), cert. den. 346 U.S. 887. No such effort by the Company can be gleaned from the facts of record.[3]

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[3] In rejecting the Union's contention that Kohler was from the outset of the negotiations inflexible on every major issue, the Trial Examiner observed that "progress was made on some of those issues by narrowing the areas of disagreement" (J.A. 141-142). But what should be noted is that the "major issues" upon which disagreement was supposedly narrowed are nowhere identified. As Member Jenkins points out, "such modifications as were accepted went to 'minor' areas of dispute and involved, in most instances, the reinstitution of certain of the language of the 1953 contract's formulation of the Respondent's *explicit* commitments . . . The record notes of the negotiations as to the following are illustrative of the kind of 'concessions' made by Respondent during the extensive conferences described. The expiring contract contained language concerning the mechanics of the grievance machinery which subjected the right of Union stewards called upon by employees in other divisions to process a grievance, to leave the department for that reason to the foreman's grant of permission with only the following conditional language: 'but such permission will not be unreasonably withheld.' The Company's January 25 proposal as phrased initially, modified this specific provision of the 1953 contract by the elimination of the quoted language. The Union's initial proposal for modification of that same provision removed the right of the foreman to withhold permission. After many hours of discussion were consumed on this matter and after extensive effort by the Union, the Company agreed to reinstate the quoted language as part of its proposal" (J.A. 107).

In early February, 1954, when negotiating sessions commenced, the Union sought a substantial wage increase; a union shop; the standard UAW pension plan; improvements in the seniority guarantees; increased hospitalization and related benefits; and some amelioration of the conditions of the disadvantaged enamel workers. Kohler, at the outset of the negotiations and throughout the entire prestrike period, rejected *every* significant Union proposal. In addition, Kohler proposed dilution of the seniority guarantees and proposed to "clarify" the existing arbitration arrangements by withdrawing such vital matters as discharges from the arbitrator's jurisdiction and by rendering arbitral awards more vulnerable to judicial attack. On none of the central issues—wage increase, union shop,[4] meaningful arbitration—did Kohler ever make a substantive concession.

7. At the outset of the 1954 negotiations Kohler had proposed a new contract which was in no respect more advantageous to the workers and in many significant respects less advantageous than the existing contract.[5] Until

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[4] Conger opposed union security provisions on grounds of asserted principle (J.A. 13084-13087). But the lack of real principle involved was made plain by the fact that Kohler had offered a union shop to KWA. *Ibid.* A better explanation of Kohler's opposition to union security provisions was that of Conger's co-negotiator, Howe, that a union not protected by a union shop is generally more tractable (J.A. 700-701, 1068.)

[5] Member Jenkins summarized the proposed contract thus (J.A. 104-105):

> "The Respondent's proposed contract terms, viewed as a whole, and in terms of the 1953 contract, were framed to reduce nonmonetary benefits afforded employees and their representatives under the 1953 contract; to remove from the authority there given the Union as a bargaining representative and back to the unilateral determination of the Respondent, matters of vital concern to the employees and their representatives; and to afford no new economic benefits. By comparison of the proposal to the 1953 contract, the new proposal expanded the pre-existing area of the Respondent's power, should it so choose, to deal with the employment relationship without regard

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late February Kohler insisted that this was its only proposal. Then, according to Robert Burkart, a UAW International Representative,

> "on the 23rd of February, we had noted to the company during a bargaining session that we were rapidly coming down to the deadline. The contract was due to expire on March 1, and it was obvious from the lack of progress that we were not going to have an agreement by that time and therefore we requested the company that they extend the contract for one month, through the month of March, so that we would have orderly procedures in the plant for collective bargaining and that we would still be working under a contract during the time that we were developing the terms of a new contract . . ." (J.A. 552-553).

But the Company *rejected* the Union's proposal to facilitate further bargaining by temporarily extending the contract for one month. Kohler announced that "So long as your contract committee continues to insist on exorbitant and unrealistic demands which would jeopardize the future of the company and the jobs of its employees, a short-term extension of the present contract will not serve any useful purpose" (J.A. 2039). Herbert Kohler had himself had occasion to evalute precisely this kind of negative response two years before. In 1952, according to Mr. Kohler,

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to the collective bargaining relationship. This it did by the dual device of broadening the clause concerning 'management functions' and by foreclosing effective use of the substitute means of Union-balancing control offered by grievance-arbitration machinery as to those matters. It withdrew the right of the Union to negotiate on alleged inequitable pay standards. It deleted the Company's prior commitment to consider the determinations of the arbitrator either as to his jurisdiction or as to arbitrability of a dispute as binding upon it. And it contained other less obvious reductions in the Respondent's prior contract commitments involving the operation of the grievance machinery and the employees' presentation of grievances."

in the course of negotiations between Kohler and KWA, "Kohler Co. offered to extend the contract with the KWA pending further negotiations" (J.A. 2264). But the offer was declined, and Mr. Kohler asserted in words relevant here: *"This is not the conduct of people who wish to arrive at a settlement. It is the conduct of people who do not want a settlement, but who want a dispute"* (J.A. 2264).

8. On February 25, 1954, Kohler countered the Union request for a one-month's extension of the contract with a proposal for a one-year extension, including the existing arbitration provision (J.A. 142); and on the next day Kohler proposed as an alternative a 3-cent per hour wage increase conditioned on acceptance in toto of Kohler's proposed contract emasculating existing arbitration procedures (J.A. 142-143). If the Union wished to forego any wage increase, the Union could keep the arbitration provision contained in the 1953 agreement. If the Union wished to take the munificent 3 cents, the Union would have to agree to a contract even more unfavorable, especially with respect to the crucial arbitration provision, than the one which was about to expire. The Company's conditioning of even a paltry 3-cent wage increase upon the Union's relinquishing existing arbitration rights, and its offer to continue those arbitration rights only at the expense of any wage increase whatever, demonstrate a desire to offer only that which the Union obviously could not accept.[6]

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[6] It is questionable whether the "3 cents and no arbitration" proffer of the Company was an offer of anything at all. In a very real sense, even the 3-cent increase could have been rendered illusory by the surrender of arbitration for, in the light of the unilateral controls upon whose continuance the Company insisted in the 1954 negotiations, *there would have been no protection against repetition of the Company's manipulation of wages under the 1953 contract which had wiped out the very wage increase the Union had won in that earlier contract.* As Member Jenkins points out (J.A. 99-100):

"The facts on which we all agree show that the grieving workers claimed that the Respondent, by an alleged manipulation of its work

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9. Kohler's disdain for genuine unions, and its indifference to its statutory obligation to bargain with the certified union of its employees' own choosing, were clearly manifested during the entire pre-strike negotiating sessions. These sessions were punctuated by Conger with his "usual phrase of he didn't see any point in wasting any more time, or didn't see that as they had went as far as they were prepared to go there was no reason to continue" (J.A. 1083-1084). Again, as one of the Union negotiators recalled, "When we would start discussing a direct contractual issue, or a comparison of a contractual point, we never could keep the Company on the subject matter before us. They went into violent attacks against the UAW generally, not just this local union, but throughout the country, and pointed to organized labor in general as being the cause of the ills of the country" (J.A. 952). Meanwhile, Kohler was proceeding with strike preparations which, to judge from the findings made by the Wisconsin Employment Relations Board, drew heavily upon Kohler's bloody repulsion of an independent union back in 1934:

> "There was testimony by the President of the Company to the effect that the Company had equipped and has in its plant a small arsenal. He testified that there were clubs and guns provided for in the plant. His testimony also indicated that either there were tear bombs provided for in the plant but if not the presence of tear gas bombs would have his approval. With all the legislation on the books today, both Fed-

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or production standards, had deprived them of the wage increase benefits promised by the collective contract. They claimed that they earned less after the 1953 contract than they had earned before and therefore were denied the contract's 3¢ increase. Whether or not this claimed violation of the wage provisions of the contract had substance, is something that the Union was never able to determine. *For the Respondent never supplied the information needed to determine the facts.*"

eral and State, aimed at protecting, not only the rights of employees and employers in labor disputes, but the rights of the public as well, it seems inconceivable that in a forward-looking community in a state as progressive as the state of Wisconsin any employer would feel it necessary to resort to self-help by the means of arms, ammunition and tear gas bombs. There is no possible justification for an employer today to resort to the use of such means in any strike" (Co. Ex. 42).

10. When the 1953 contract expired on March 1, 1954, and Kohler still refused to engage in genuine bargaining, the Union was forced into action and the strike commenced on April 5, 1954. Four weeks later, the Wisconsin Employment Relations Board made a major effort to get the parties back to the bargaining table (J.A. 635-636). As the Wisconsin Board itself described its intervention:

"the Board laid down certain conditions, largely limitations on the type of picketing theretofore conducted, that if accepted by the Union would result in a continuance of the hearing. Conditions laid down by the Board were accepted by the Union. Acceptance of such conditions was contingent on the Company agreeing that it would immediately commence bargaining with representatives of the Union in a bona fide attempt to reach a mutually satisfactory collective bargaining agreement. Arrangements for such bargaining session were immediately made, the first meeting to be held on Friday, May 7. Such meeting took place with a panel of three impartial mediators present. The bargaining continued throughout that day. In the meantime on Thursday and Friday, picketing was carried on pursuant to the truce agreement. Persons desiring to go to and from the Kohler plant proceeded

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freely. There was no substantial interference with anyone desiring to enter or leave. At the conclusion of the Friday conference, notwithstanding that the Federal mediators were willing, and the Union representatives were desirous, of continuing the negotiations both on Saturday and Sunday if necessary, the Company representatives arbitrarily refused to bargain on either of those days" (Co. Ex. 42,* pp. 7-8).

Conger's stated excuse for not meeting further was that he needed the weekend to prepare a brief due the following Tuesday in the United States District Court action brought by the Union to enjoin further prosecution before the WERB of the Kohler Company's complaint of unfair union practices, over which the state board was thought by the Union to have no jurisdiction (J.A. 3680-3681). Conger persisted in his refusal to meet, notwithstanding the Union's expressed willingness to join with Conger in a request to District Judge Tehan for an extension of time to file briefs in the federal action (J.A. 3681-3682). That there would have been no difficulty in securing such an extension is clear. Indeed on May 14, on exploring settlement possibilities with the parties in chambers, Judge Tehan took occasion to comment on Conger's stalling tactics:

"... Judge Tehan said that he was provoked with the statements that he read in the press, that the company was using the filing of briefs before the United States District Court as an excuse for not continuing bargaining after May 7th, and he promptly told Mr. Conger:

'You know that our rules are quite flexible, and if you wanted an adjournment on the filing of briefs, you could have gotten it for days and months; if this would

help settle the strike, that is a more important thing than the filing of briefs' " (J.A. 1467).

Nor is there room for doubt that Conger's refusal to go forward with negotiations over the weekend of May 8 and 9, 1954, gravely jeopardized settlement possibilities. As the WERB later observed: "We are thoroughly satisfied that had the company representatives honestly desired to arrive at settlement of the dispute, they would have been anxious to bargain and would honestly have tried to arrive at a settlement of the issues responsible for this unfortunate work stoppage" (Co. Ex. 42, p. 8).

11. On June 1, 1954, soon after the strike commenced, Kohler granted a unilateral wage increase which eloquently bespoke its continuous unconcern with the statutory requirement of collective bargaining (J.A. 31, 35, 3585-86). The three pennies which Conger had earlier "offered" the Union as the *quid* for the *quo* of foregoing arbitration, suddenly became three pennies which Conger benevolently and unconditionally dispensed to Kohler employees—without consulting or even notifying the exclusive bargaining representative of the employees. Not only was the unilateral increase, as the Board found, a flagrant and grossly prejudicial blow to subsequent negotiations, but the increase withheld from the Union and granted the workers shows again that the only principle motivating the Company at the pre-strike negotiations was the principle of avoiding an agreement with the Union.

12. Kohler's anti-union animus, its illegal aggressions against unions and union members, and its conduct of "negotiations," correlate closely with Kohler's record of noncooperation with all public officials who have called on Kohler to try to reach an agreement with the Union. Before June 1, 1954, Kohler brushed off the conciliation efforts of a federal district judge, Judge Tehan (J.A. 3687-3688), and

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a state judge, Judge Schlichting (J.A. 1477). Thereafter, Kohler persisted in its pattern of stubborn indifference to its public responsibilities when it (a) refused the arbitration proposal made by Governor Walter J. Kohler (a nephew of Kohler's President) (G.C. Ex. 43); (b) in September, in "its private meetings with Judge Murphy . . . did not even pretend to go through the motions of collective bargaining, despite the Judge's repeated assurances that a slight wage increase would settle all issues in dispute" (J.A. 199); (c) in April, 1955, rejected the proffered good offices of the Mayor and other municipal officials of Sheboygan, Wisconsin (J.A. 2120); (d) in June, 1955, rejected the proffered good offices of a subcommittee of the United States Senate (J.A. 2136-2138). The following November President Kohler explained to an audience in Birmingham his philosophy about proposed interventions of this kind: "The do-gooders have mixed in with offers to help settle the strike. All they really want to do is save face for the Union . . ." (G.C. Ex. 326).

13. Finally, it cannot be put aside in the evaluation of the Company's so-called "bargaining" in the pre-strike period that only a few weeks following the last pre-strike negotiating session of April 3, 1954, the Company commenced its adjudicated 6-year refusal to bargain in good faith with the Union. The Company continued its illegal course of conduct to the date of the Board's decision, engaging in numerous violations in disparagement of the bargaining representative and the freedom of collective protection guaranteed the workers under the Act. Such adjudicated violations include refusal to furnish data necessary for bargaining, unlawful surveillance of Union and workers, discriminatory discharge of striking temporary employees in the Shell Department, discriminatory eviction of strikers from their homes, and two unilateral wage in-

creases not offered to the Union but granted the workers (J.A. 22-28, 149-154; 60-64, 388-394; 40-41; 177-182; 52, 227, 232-234; 31, 34-38, 171-172, 209-210).

For clarity of understanding, Kohler's *adjudicated* violation before and after the 1954 pre-strike negotiations, are set forth below in tabular form:

CALENDAR OF ADJUDICATED LABOR LAW VIOLATIONS BY THE KOHLER COMPANY

| | |
|---|---|
| 1933-1951 (J.A. 12-13) | Company instigation, domination and financing of KWA, a Kohler workers' "union." |
| 1952 (220 F. 2d 3) | Unlawful interference, restaint and coercion by Kohler of its employees during UAW organizational compaign. |
| 1954 (J.A. 49-51) | Exertion of pressure on chief steward to discourage his grievance representation function. |
| March 6, 1954 (J.A. 29) | Refusal to furnish relevant machine operators' earnings needed for grievence process. |
| June 1, 1954 (J.A. 31) | Unilateral wage increase not previously offered to the union and commencement of refusal to bargain in good faith. |
| June 14, 1954 (J.A. 23-26) | Refusal to furnish incentive earnings for enamelware division needed for bargaining. |
| June-July, 1954 (J.A. 61-62) | Unlawful company surveillance of protected concerted activity. |
| July 1, 1954 (J.A. 40-41) | Discriminatory discharge of 53 striking temporary employees in the Shell Department. |
| September, 1954 (J.A. 43) | Company bargaining "not to reach but to avoid agreement". |
| December, 1954 (J.A. 52) | Discriminatory evictions of strikers from their homes. |
| August 5, 1955— (J.A. 46, 43-44, 203) | Unilateral wage increase not previously offered union and continuing refusal to bargain with the union. |

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Upon the basis of all of the foregoing facts, the Union pointed out below that the Board's failure to find that the Company refused to bargain in good faith prior to the commencement of the 1954 strike was wholly arbitrary. The Union urged that the Board's error in this respect arose from its truncated examination of the period of negotiations before the strike, and from its failure, in examining the Company's conduct, to give *any effect* to the previous twenty years and to the succeeding six years of Kohler's adjudicated refusal to bargain in good faith.[7]

The court below has remanded the question of Kohler's pre-strike "good faith bargaining" for further Board examination. In so doing, the Court pointed out that the Board's findings on this aspect of the case are inadequate and do not manifest whether the Board "failed to consider" some of the crucial evidentiary factors bearing upon the question (Appx. to Pet., p. 14a, n. 28). While the Court was persuaded that the Board had erroneously disregarded "antecedent events" (as well as relevant contemporaneous evidence), bearing upon the Company's purported good faith bargaining prior to the strike, the Court naturally did not dispose of the merits of the issue. As the Court noted, "We do not, of course, purport to assess the weight to be accorded these events. That is the Board's

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[7] This was the essence of the perceptive dissent by member Jenkins:

> "*All* of the . . . 'independent' unfair labor practices committed by the Respondent during the period covered by the complaint have been sustained by the majority, but *only* those committed after the occurrence of the strike have been deemed relevant to the basic 'good faith' issue. It *is by this failure to consider the pre-strike unfair labor practices and other peripheral conduct of the Respondent as an inextricable part of the total fabric of the evidence that the majority fails to see the 'case' clearly established by the General Counsel and denies the complete remedy which should have been afforded* (J.A. 92).

task" (Appx. to Pet., p. 15a). Prior to such assessment by the Board, factual issues ordinarily committed in the first instance to administrative jurisdiction certainly do not warrant this Court's review.

**The Petition Seeks This Court's Review of Primarily Factual Questions Presently Remanded to the Board for Further Findings and Disposition.**

1. *The Pre-Strike Refusal to Bargain*

The Company seeks review (Pt. III, Pet. p. 36) of the factual issues involved in the remand to the Board of the pre-strike bargaining question, and it does so in an area where the facts speak eloquently against its own contentions. The Court of Appeals' remand for further Board review of the question of pre-strike refusal to bargain constitutes the very least that the Court could have done in light of the compelling circumstances of record which we have just reviewed. While we believe that the twenty-year pre-strike history of violations by the Company and the six years of violations following the strike, preclude any valid Board finding other than that for which Board member Jenkins contended—that Kohler's pre-strike "bargaining" was but a pretext to avoid rather than to reach settlement—certainly the facts compelled at the least a remand for further clarifying findings on a question inadequately treated by the Board's majority opinion.[9]

[9] Petitioner urges that this Court's *Universal Camera* ruling (340 U.S. 474) was disregarded by the court below. But as the court below made clear, it was not purporting to re-assess a balance of facts committed to agency discretion, but only to call for fuller agency findings and consideration where the Board had apparently chosen to *disregard* an entire probative area—the twenty years of Kohler refusal to bargain in good faith before and the six years after the pre-strike period. It is precisely to *avoid* treading upon the area committed by *Universal Camera* to the Board, that the court below properly called for a fuller exposition on the Company's pre-strike negotiating posture.

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No reason has been suggested for this Court to interfere with the orderly remand to the Board. It is submitted that if a reviewable question could ever arise over this largely factual issue, the time for this Court's review must await the considered disposition by the Board and the Court of Appeals of the unresolved questions regarding the pre-strike bargaining.

### 2. *The April 5th—June 1st Dispute*

The Company claims (Pt. I, Pet. p. 18) that its constitutional rights were violated when the Board found that the Company granted a unilateral wage increase on June 1, 1954, under a complaint alleging the increase to have occurred "on or about April 5, 1954." In urging that the June 1st date for the Company's wage increase was pulled "out of the hat" (Pet. p. 22), the Petition disingenuously neglects to point out that the "hat" from which the date was pulled was *the Company's own judicial admissions.* Thus Herbert Kohler, the President of the Company, testified (J.A. Vol. II, 156) that the three cent increase was *not* made on April 5 but *"some time later, effective April 5"* when *"everybody was working"*—i.e. after production resumed on May 28th. And Lyman C. Conger, chief attorney and labor relations director of the Company who filed the petition for certiorari in this Court, explicitly agreed with the trial examiner that the three cent increase was put into effect *"just about May 28"* (J.A. 36-37). As Mr. Conger explained it, the three cent raise was put in "as of April 5 but I may very often tell the payroll to make an increase retroactive ten days back, or 15 days back. I think sometimes we have added even several months back, and this particular case, unfortunately our records do not show when we gave the instructions" (id). Contrary to the Company's present contention that the three cent increase was given on

April 5 when the strike commenced, the two chief Company spokesmen, Messrs. Kohler and Conger, both asserted at the Board hearings that the increase was granted at the end of May—which is just exactly what the Trial Examiner and Board unanimously found.

As the Board demonstrated in the court below, in response to the Company's identical quibble on dates, the most charitable interpretation of the Company's new position on dates is that it was playing fast and loose with the Board when it made its judicial admissions before the Trial Examiner. In any event, the Company could hardly have been prejudiced by the June 1st finding under a complaint alleging "on or about April 5," when the finding was based on its own admissions. Cf. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-351. Moreover, the question posed is immaterial, since the Board has also ruled that the unilateral wage increase would have been equally a violation of the Company's bargaining obligation had it been accomplished on April 5th instead of June 1st. See J.A. 35, n. 34.

Finally, not only do the facts show the Company's quarrel with the Board about dates to be factually erroneous and legally immaterial, but the date question is rendered wholly academic by the Company's pre-strike refusal to bargain in good faith. It matters not whether the Company's failure to bargain on its three cent wage increase occurred on April 5 or June 1, if the Company violated its obligation to bargain even before the strike commenced—a question which has been remanded by the court below for the Board's further consideration. And this same circumstance renders immaterial the Company claim (Pt. II, Pet. p. 25) that there was no evidence showing that its unilateral three cent increase after commencement of the

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strike served to "prolong" the strike and thus to convert it into an unfair labor practice strike.[10]

### 3. *The Discharge of the 77 Strikers*

The Company complains (Pt. IV, Pet. p. 41) of the remand to the Labor Board for its further disposition on the issue whether 77 discharged strikers should be reinstated pursuant to the Board's discretionary authority under Section 10(c) of the Act. But, all apart from the overwhelming equities in support of reinstatement for the 77 discharged strikers, no reviewable issue can possibly arise until the Board has decided whether or not to exercise its reinstatement discretion and has made findings which reveal the predicate of the course it has chosen.

Without condoning in any way the strikers' misconduct at Kohler, we respectfully suggest that the men would have been less than human not to have reacted to the provocations offered by the Company. Instead of bargaining in good faith, the Company tendered only obviously unacceptable proposals, hoping to force a strike and win "twenty

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[10] If the strike was induced by the Company's refusal to bargain in good faith, a point which has all along been a principal Union contention and which is now remanded for further Board consideration, the Company's denial of prolongation has no further significance. We note, however, that the Board's finding of prolongation by virtue of the Company's unilateral wage increase hardly seems open to question. Indeed, it is hard to fathom what motive the Company's unilateral increase might have had other than to impair the Union's ability to win a bargained agreement with the Company and thus to prolong the difficulties obstructing settlement. In any event, it is not incumbent upon the Board to show that but for the Company's illegal conduct the strike would have ended; rather it is the Company's burden to show that other issues alone influenced the continuation of the strike and that its own violation of the Act in no way contributed to the difficulties of agreement. Clearly, the unilateral grant of a wage increase seriously contributed to the difficulties of agreement in this case.

years of labor peace" (J. A. 193).[11] Many of the men remembered the bloody ferocity with which the 1934 strike was crushed and these memories were rekindled when the Company began stockpiling weapons and making other preparations for war in early 1954 (*supra*, pp. 11-12). Not surprisingly, when the strike finally commenced on April 5th in an effort by the workers to obtain a contract and in protest against the Company's refusal to engage in genuine bargaining, it was attended by deep bitterness on the part of the strikers. Mass picketing was engaged in for some weeks. Incidents of misconduct and violence, although mostly petty in nature, did occur in the ensuing months. Large groups of strikers and non-strikers demonstrated in front of the employment office and at the homes of those who continued to work.

The Company maintained a list of hundreds of Kohler workers who engaged in one or more of these activities. But it was not until March 1, 1955, many months after these events, that the Company first sought to penalize any of the Kohler workers. On that date, it selected some 90 of the workers (including the 13 leaders of the strike), and discharged them (J.A. 234, 246-248).

Before the Trial Examiner, the Union and the Board's General Counsel sought reinstatement of 77 of the discharged strikers on a number of grounds. It was pointed out that many of the dischargees had merely been present at, rather than participants in, misconduct. As to other strikers, their "misconduct" (such as mass picketing) was no more grievous than that of hundreds of those against

[11] Elmer A. Oskey, chairman of the Union's contract committee, voiced a resignation which was widespread among the Union membership: "I felt that the company was not bargaining in good faith and when I heard Mr. Howe make a statement to the effect that a shut-down has been coming and we might as well have it now, and their attitude at the bargaining table, that I felt that the company forced me to go out on strike" (J.A. 1671).

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whom no disciplinary action was taken, and it was urged that the Company had "condoned" their action. The Trial Examiner found that some 35 of the 77 dischargees had merely been present at scenes of misconduct or had merely engaged in "condoned" mass picketing, and ordered their reinstatement (J.A. 234-362). On review, the Labor Board divided 3-2 in reversing the Trial Examiner and holding all 77 strikers properly discharged (J.A. 64-73).

As a separate and principal ground for reinstatement of all 77 discharged strikers, the General Counsel and the Union urged that the Company's grievous violations of the rights of the workers, which had prompted and provoked their misconduct, warranted their reinstatement under the discretionary authority granted the Board by Section 10(c). Relying principally upon the First Circuit's decision in *Thayer Co.* v. *N.L.R.B.*, 213 F. 2d 748 (C.A. 1, 1954), cert. den., 348 U.S. 883, the General Counsel and the Union urged that Kohler's unfair labor practices should be weighed against the strikers' misconduct in order to determine whether reinstatement of the discharged strikers would "effectuate the policies of the Act." Neither the Trial Examiner nor the Board undertook that balancing of misconduct.

The Trial Examiner found that the Board had not accepted the ruling of the *Thayer* case (J.A. 245). Accordingly, he held that there were only two questions for him to determine with respect to the status of the discharged strikers—whether they engaged in misconduct and whether Kohler discharged them for that misconduct.[12] The Board adhered to this narrow view, stating that only these two questions—whether the strikers engaged in and were dis-

[12] ". . . what is at issue is whether the 8(a)(3)'s had engaged in the strike activities for which Respondent discharged them and whether their conduct was such as to remove them from the protection of the Act" (J.A. 241).

charged for misconduct—were presented for its review (J.A. 65).[13] Having ruled that the 77 strikers did engage in misconduct for which Kohler discharged them, the Board failed to order their reinstatement, without any consideration or findings on the question whether or not reinstatement would or would not effectuate the policies of the Act.

The majority opinion in the court below carefully reviewed the question of the discharge of the 77 strikers and the Board's discretionary reinstatement authority under Section 10(c) of the Act. The Court, convinced that the Board had been entertaining an erroneous self-denying position, remanded the issue of the 77 discharges to the Board for further consideration and if necessary for modification of the Board's order. The Company seeks review of this portion of the ruling below, urging an alleged "conflict" with this Court's *Fansteel* ruling and decisions of three other circuits.[14] But this Court's *Fansteel* ruling

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[13] "The Trial Examiner found that although the General Counsel did make out a *prima facie* case of discriminatory discharge . . . (all of the strikers were discharged because they had engaged in concerted activities in support of the strike), the real issues were whether the dischargees had engaged in the strike activities for which the Respondent discharged them and whether their conduct was such as to remove them from the protection of the Act. *The Board agrees with these conclusions*" (emphasis supplied).

[14] It is revealing that the Company never cited below the three circuit court decisions which it now asserts to be contrary to the ruling below and, of course, the alleged conflict in decisions does not exist. In *Clearfield Cheese*, 213 F. 2d 70, the Court reversed a Board "condonation" ruling regarding 21 discharged workers, but no Section 10(c) discretion point was either made to or passed upon by the Court. In *Longview Furniture*, 206 F. 2d 274, the Court found that the Board had exceeded its Section 10(c) discretion by reinstating workers who had participated in a criminal assault, but the Court merely returned for Board reconsideration, as in the instant case, the reinstatement question regarding strikers discharged for less serious misconduct. And in *W. T. Rawleigh*, 190 F. 2d 832, the Court only reversed a Board reinstatement order as an abuse of Board discretion where the misconduct of the workers was serious and there was no balancing employer misconduct such as that engaged in by the Kohler Company in the instant case. *None* of the three decisions

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did not delete from the Act the Board's discretion to reinstate strikers discharged for misconduct. All that this Court ruled in *Fansteel* was that, in light of the aggravated conduct of the sit-down strikers, the Board had there *exceeded* its ambit of discretion in their reinstatement.[15] By contrast, the Board here has yet to consider whether or not its discretion should be exercised, even with respect to strikers discharged for minimal misconduct or mere presence at demonstrations.

Since the Board has statutory discretion, it is essential that it undertake a conscious determination whether it should be exercised, making findings and conclusions which assure that failure to exercise discretion is not the product of mistaken belief that none exists. See Administrative Procedure Act, 5 U.S.C. 1007 as illuminated by S. Rep. 752, 79th Cong., 1st Sess., pp. 24-25.[16] And see *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177; *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80. If the Board's decision to reinstate or not to reinstate discharged Kohler strikers should ever present an appropriate issue for this Court's review, that time can

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deny the Board an area of discretion to reinstate strikers discharged for misconduct; none conflict in any way with the remand to the Labor Board for the considered exercise of administrative judgment within the area of statutory discretion.

[15] "We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed *in this instance* would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure . . . whatever discretion may be deemed to be committed to the Board, its limits were transcended *by the order under review*" (306 U.S. at 256) (emphasis supplied).

[16] "Findings and conclusions must include all the relevant issues . . . relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often determine whether they have power to act rather than whether their discretion should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine other or additional facts that might be offered by way of rehearing or reconsideration of decisions."

come only after the Board has made the minimal findings which would enlighten a reviewing court as to the reasons for the course the Board has chosen. Here, in the absence of any Board consideration of the issue posed, the application for certiorari is clearly premature.

## Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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